

Noted

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 09-4978-C

NOTICE SENT
08-15-14
B.P.S.
N.D.H.H.
B.K.K.
K.L.C.
M.A.B.
J.M.S.
J.P.K.
L.L.R.
H.L.L.
P.M.D.
MASS.A.G.
J.J.A.
R.L.Q. JR.
N.I.T.
S.G.

BOSTON POLICE DEPARTMENT

v.

JILL KAVALESKI and THE MASSACHUSETTS CIVIL
SERVICE COMMISSION

and

JILL KAVALESKI,
Third-Party Plaintiff

v.

JULIA READE, M.D., and THE CITY OF BOSTON

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COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSION

(LAT)

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF
IN COUNTERCLAIM KAVALESKI'S MOTION FOR
SUMMARY JUDGMENT AGAINST THE CITY OF BOSTON (Paper # 69),
and DEFENDANT IN COUNTERCLAIM, CITY OF BOSTON'S
CROSS-MOTION FOR SUMMARY JUDGMENT (No paper #)

This long and complicated action began as an appeal by the Boston Police Department ("the Department") from a determination by the Civil Service Commission ("the Commission") that the Department had improperly bypassed Jill Kavaleski ("Kavaleski") for employment as a Boston Police Officer, based upon an unsupported determination by Dr. Julia Reade ("Dr. Reade") that Kavaleski was psychologically unqualified for the job. Kavaleski, in turn, brought a counterclaim

against the City and a third-party claim against Dr. Reade for alleged violations of the Massachusetts anti-discrimination statute, G.L. c. 151B.

On September 13, 2010, the Superior Court (Gaziano, J.) allowed the Boston Police Department's Motion for Judgment on the Pleadings, concluding that the Commission had erred in considering certain testimony given by Dr. Reade in a different proceeding. On appeal, the Supreme Judicial Court reversed the Superior Court's decision and affirmed the Commission's decision, holding that notwithstanding the Commission's erroneous reliance on that testimony, the evidence before the Commission was sufficient to allow the Commission to reject the Department's assertion that Dr. Reade's evaluation of Kavaleski was sufficient to disqualify her from consideration.

Kavaleski and the City have now cross-moved for summary judgment on Kavaleski's counterclaims against the City. For the following reasons, Kavaleski's summary judgment motion is allowed, and the City's summary judgment motion is denied.

BACKGROUND

The following facts are undisputed unless otherwise noted. In 2005, Kavaleski applied to become a police officer with the Department. At that time, she took a Civil Service exam and submitted a "Student Officer Application." It appears that in 2006, the Department made her a conditional offer, subject to medical and

psychological examinations.

Post-offer psychological examinations are conducted pursuant to the Department's Psychological Screening Plan ("the Plan") for municipal fire fighters and police officers. All recruit candidates who receive a conditional offer of employment participate in the Plan. The Plan, which was approved by the Commonwealth of Massachusetts' Human Resources Division in 2004, consists of three phases: Phase I – Testing, Phase II – Clinical Interview, and Phase III – Second Opinion Psychiatric Interview.

Phase I of the Plan includes a group administration of the Personality Assessment Inventory ("PAI") and the Minnesota Multiphasic Personality Inventory-2 ("MMPI-2"). Phase II of the Plan consists of an interview with a Department psychiatrist. Phase III only takes place if the Department psychiatrist determines that further review is necessary. It consists of meeting with another Department psychiatrist, the second-level screener. If the second-level screener identifies a "Category A" or "Category B" condition or disorder, the candidate is disqualified from employment as a Boston police officer, although the parties dispute whether the disqualification is automatic or subject to further review.

After completing the PAI and MMPI-2, Kavaleski proceeded to Phase II, where she met with the Department's first-level psychological screener, Dr. Andrew Brown ("Dr. Brown"), in January 2006. In his report, Dr. Brown wrote that Kavaleski's

MMPI-2 responses were too defensive to permit an adequate psychological assessment and as such were invalid. He wrote that she appeared "almost gleeful" at stymieing the examination. He continued: "[t]o the extent that reliable information from testing, other documentation, interview and mental status examination is available, the applicant's profile is not inconsistent with the possible presence of obsessive compulsive personality traits and somatization. Body image concerns and eating concerns may be present." He did not explain the basis for these conclusions. He referred to her as "cold" and "emotionally disconnected" and wrote that she "demonstrates deficiencies in her capacity to affectively [sic] engage with other persons."

Kavaleski met with the second-level screener, Dr. Reade, in February 2006. Dr. Reade described her as "a thin woman, dressed in casual clothing, with messy hair" and described her as "subdued and mildly depressed. Her thinking was rigid and concrete. She denied symptoms of an eating disorder, but reported that her weight is 118 pounds, approximately 10 pounds less than two years ago, and attributed her weight loss to working out more frequently." Dr. Reade concluded that "[s]he is extremely guarded and concrete to a degree that would, in my opinion, interfere with her ability to communicate effectively with coworkers or to discuss her rationale for a particular course of action." As a result, Dr. Reade found Kavaleski "not acceptable", and it appears that Kavaleski was "bypassed" after being deemed psychologically

unqualified for the position.

Sometime thereafter, the City again sent Kavaleski a conditional offer of employment, subject to Kavaleski passing a medical examination and a psychological screening. She took the psychological examinations again and met with a different first-level screener, Dr. Marcia Scott ("Dr. Scott"), in September 2006. Dr. Scott described her as "thin, pale, and listless" with "unkempt" hair. "She was visibly uncomfortable" when asked about her weight and when Dr. Scott asked her if she had "trouble with eating." Dr. Scott described her as "concrete" with a "rigid and avoidant" coping style.

In November 2006, Kavaleski met with Dr. Reade, who concluded that "[a]lthough [Kavaleski] is clearly a very bright and hardworking woman, with what appears to be a sincere interest in police work, [she] is significantly limited by her interpersonal manner, her guardedness and concrete thinking." Again, it appears that Dr. Reade recommended that she be bypassed.

Six months later, Kavaleski took the PAI and MMPI-2 for a third time. She then met with Dr. Scott again in March 2007. In her interview notes from this meeting, Dr. Scott described Kavaleski's MMPI-2 results as "defensive" and expressed concerns about the validity of those results and Kavaleski's PAI results. She described Kavaleski as "even thinner" and "extremely thin" and as "cachetic [sic] with loss of facial padding and sallow." Dr. Scott described Kavaleski's hair as "messy but

drawn back tightly." After the interview, which touched on Kavaleski's upcoming wedding and Kavaleski's desire to become a police officer, Dr. Scott concluded that Kavaleski was "somewhat less guarded" now that she had been through several screening interviews. Dr. Scott wrote as follows:

"She is a steady controlled person but has very limited self-awareness, little understanding of her motivations or emotional limitations and inflexible approaches to both internal and external stresses. These traits would affect her capacity to evaluate situations and make effective judgments in less tightly controlled situations than she now faces. They also provide few effective coping skills for dealing with the stresses she would face in the job of an armed police officer."

Dr. Scott again forwarded Kavaleski to Dr. Reade, who met with Kavaleski in April 2007. Dr. Reade wrote as follows:

"[Kavaleski] was neatly dressed in a pants suit, and her hair was messy. She was thin, but not unhealthy looking, and spoke in a quiet voice. Ms. Kavaleski was stiff and guarded but appeared to be making an effort to be more engaging and spontaneous. Her thinking was extremely concrete and she responded to questions by focusing on very literal details and seemed to ignore or have difficulty grasping the larger significance."

As an example of Kavaleski's difficulty grasping "the larger significance," Dr. Reade cited Kavaleski's alleged inability to understand why she had been bypassed by the Department in the past. Dr. Reade wrote that Kavaleski "could not consider that [she had] any [psychiatric] problems." Dr. Reade concluded that Kavaleski "continues to present as a psychologically inflexible, interpersonally stiff woman whose extreme defensiveness limits her capacity to reflect on her own

decision-making, responses, actions or impact on others. Her concrete cognitive style is equally limiting and is likely related to what appears to be a characterologic rigidity."

None of the screeners diagnosed Kavaleski with a psychiatric condition or disorder. It is undisputed that Kavaleski has never been diagnosed with or treated for a psychiatric condition or disorder.

The City revoked Kavaleski's conditional offer of employment, as, "[o]n the basis of [Dr. Reade's] evaluation, Ms. Kavaleski was found to be unqualified for appointment as a Boston Police Officer." The City also determined that a reasonable accommodation could not be offered to Kavaleski "[g]iven the highly stressful nature of urban police work." The City hired another applicant in Kavaleski's place who was ranked below Kavaleski on the civil service eligibility list.

Kavaleski appealed, and on October 22, 2009, the Civil Service Commission ("the Commission") ruled in her favor. The Commission found Kavaleski, who testified at the hearing, to be a credible witness. The Commission found that Dr. Reade did not identify or substantiate any traits that would render Kavaleski unfit to serve as a police officer and did not identify any Category A or Category B conditions applicable to Kavaleski. It found that the psychological evaluation process was "so subjective and/or indefinite that it amounts to an opinion, which is incapable of proof or verification." The Commission noted that all three screeners commented on

Kavaleski's alleged thinness, paleness, listlessness, and "messy hair," and had apparent concerns that she suffered from an eating disorder despite the lack of substantiating evidence to that effect. The Commission "found this description to be a clear misrepresentation of [Kavaleski's] physical appearance, presentation and demeanor and in conjunction with the other enumerated alleged negative observations to be an indication of some bias or some other improper consideration by the [City]." The Commission also found that Dr. Reade's question to Kavaleski about understanding why she had been bypassed was a "disingenuous 'catch-22' interview technique [that] demonstrated an unacceptable lack of objectivity." In general, the Commission found Dr. Reade's conclusions to be unsubstantiated, speculative, subjective, and improperly influenced by the opinions of the prior screeners.

The Commission directed that Kavaleski be placed at the top of the eligibility list. It held that the City could require Kavaleski to pass an additional mental health screening, as long as the screening interviews were audio-video recorded and were not conducted by Dr. Brown, Dr. Scott, or Dr. Reade. The City appealed. On November 6, 2012, the Supreme Judicial Court affirmed the Commission's decision. The SJC held, *inter alia*, that

"[T]he commission was entitled to reject the department's assertion that Reade's evaluation was sufficient to disqualify Kavaleski. The commission appropriately recognized that Reade's function in the psychological screening process was narrowly circumscribed. Her sole task was to determine whether Kavaleski had a psychiatric condition that would prevent her from performing, even with reasonable

accommodation, the essential functions of the job. See G.L. c. 151B, § 4 (16). The record supports the commission's conclusions that Reade's opinions were 'substantially subjective determinations' that were 'insufficiently factually supported,' and that Reade did not provide a single 'convincing situational example' to support her conclusion that Kavaleski's 'defensiveness' and 'characterologic rigidity' would interfere with police work in an 'objective real-world context.'"

Police Dep't of Boston v. Kavaleski, 463 Mass. 680, 694-695 (2012) (footnotes omitted).

On June 27, 2013, the City extended another conditional offer of employment. Kavaleski passed the subsequent psychological screening. As of the filing of the present cross-motions for summary judgment, Kavaleski was enrolled in the Boston Police Academy.

DISCUSSION

Summary judgment is appropriate where there is no genuine issue of material fact, and where viewing the evidence in the light most favorable to the nonmoving party, the moving party is entitled to judgment as a matter of law. *Opara v. Massachusetts Mut. Life Ins. Co.*, 441 Mass. 539, 544 (2004); Mass. R. Civ. P. 56(c). "The moving party has the burden of affirmatively demonstrating that the pleadings raise no genuine issue of fact on every material issue." *Genesis Tech. & Fin., Inc. v. Cast Navigation, LLC*, 74 Mass. App. Ct. 203, 206-207 (2009). "If the moving party does show that there is no issue for trial, the opposing party must respond and allege specific facts showing that there is a genuine and triable issue or the court will allow the motion." *Id.* at 207. Where, as here, the parties file cross-motions for summary

judgment, the court adopts what has been described as a "Janus-like" dual perspective to view the facts for purposes of each motion through the lens most favorable to the non-moving party. *Allstate Ins. Co. v. Occidental Int'l, Inc.*, 140 F. 3d 1, 2 (1st Cir. 1998).

I.

The court will first address Kavaleski's claim for "regarded as" disability discrimination (Count II). Kavaleski asserts that the City revoked its offers of employment after the psychological examinations because it erroneously perceived her to possess a disqualifying disorder or condition, which constitutes "regarded as" discrimination under c. 151B. The City contends that any erroneous perception of a disqualifying condition is not equivalent to "regarded as" disability discrimination, because the City did not view her as substantially impaired in any major life activity, only as unable to perform the job of Boston police officer.

A. Statutory Framework

It is unlawful "[f]or any employer . . . to . . . refuse to hire . . . or otherwise discriminate against, because of his handicap, any person alleging to be a qualified handicapped person, capable of performing the essential functions of the position involved with reasonable accommodation" G.L. c. 151B, § 4(16). A "handicapped person" is any person who has a handicap. *Id.* § 1(19). "The term 'handicap' means (a) a physical or mental impairment which substantially limits one

or more major life activities of a person; (b) a record of having such impairment; or (c) being *regarded as* having such impairment" *Id.* § 1(17) (emphasis added).

"Chapter 151B is considered the 'Massachusetts analogue' to the federal Americans with Disabilities Act." *Sensing v. Outback Steakhouse of Fla., LLC*, 575 F.3d 145, 153 (1st Cir. 2009).

Massachusetts uses a burden-shifting framework similar to that described in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973). See *Sensing*, 575 Mass. at 155. Thus, claims of handicap discrimination, including "regarded as" discrimination, follow a three-stage order of proof. *City of New Bedford v. Mass. Comm'n Against Discrimination*, 440 Mass. 450, 461 (2003). First, a plaintiff must set forth a *prima facie* case of unlawful employment discrimination. *Id.* To do so, he must "present credible evidence that he was (1) 'handicapped'; (2) 'capable of performing the essential functions' of the job 'with reasonable accommodation'; and (3) subject to an adverse action by his employer; and that (4) the position he had occupied remained open and the employer sought to fill it." *Id.* Given the statutory definition, "handicapped" for the purposes of the *prima facie* case includes being "regarded as" having "a physical or mental impairment which substantially limits one or more major life activities of a person," even if the person has no such impairment. G.L. c. 151B, § 1(17).

If the plaintiff establishes a *prima facie* case, the burden shifts to the defendant

"to articulate a legitimate, non-discriminatory reason for [its] employment decision, and produce credible evidence that the reason advanced was the real reason." *Sensing*, 575 F. 3d at 154 (citations and internal quotations omitted). "Finally, if defendant offers such a legitimate reason, the burden shifts back to the plaintiff to produce evidence 'to establish that [defendant's] non-discriminatory justification is mere pretext, cloaking discriminatory animus.'" *Sensing*, 575 F. 3d at 154 (citations and internal quotations omitted).

B. *Prima Facie* Case

I. *The ADAAA*

The parties dispute the proper formulation of the *prima facie* case in Massachusetts, and specifically, how to determine whether Kavaleski was "handicapped" for the purposes of c. 151B. The dispute centers on the first prong of the *prima facie* case: whether Kavaleski has or can set forth evidence that she was "handicapped," or "regarded as" having "a physical or mental impairment which substantially limits one or more major life activities of a person." G.L. c. 151B, § 1(17); *City of New Bedford*, 440 Mass. at 461.

The City relies on the standard set forth in *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999), in which the Supreme Court held that, under the Americans with Disabilities Act, "[w]hen the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at a minimum, that

plaintiffs allege they are unable to work across a broad class of jobs." *Id.* at 491. The Supreme Court dismissed the plaintiffs' complaint in *Sutton* because they had not shown that the defendant regarded them as substantially limited across a broad class of jobs. *Id.* at 492-493. The court observed that while the plaintiffs' vision impairment prevented them from becoming commercial airline pilots, it did not prevent them from working as pilots in other positions, such as regional pilots or pilot instructors. *Id.* at 493.

Congress overturned the *Sutton* decision in 2008 with the ADA Amendments Act ("ADAAA"). See 110 P.L. 325, 122 Stat. 3553 (2008). The effective date of the Act was January 1, 2009. See *id.* The stated intent of the statute was "[t]o restore the intent and protections of the Americans with Disabilities Act of 1990." 122 Stat. at 3554. The ADAAA specifically found that both *Sutton* and a subsequent case, *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), "interpreted the term 'substantially limits' to require a greater degree of limitation than was intended by Congress." 122 Stat. at 3554.

The City argues that *Sutton* still governs the present case, because the amendments did not take effect until 2009, and because Congress did not intend for the ADAAA to apply retroactively. See *Thornton v. United Parcel Serv.*, 587 F.3d 27, 34 n.3 (1st Cir. 2009) (noting in *dicta* that the ADAAA does not apply retroactively). By its terms, however, the ADAAA did not change the law; it overruled the Supreme

Court's erroneous interpretation of the law. See *Rohr v. Salt River Project Agric. Improvement & Power Dist.*, 555 F.3d 850, 862 (9th Cir. 2009) (concluding that "[w]hile we decide this case under the ADA, and not the ADAAA, the original congressional intent as expressed in the amendment bolsters our conclusions").

Of course, here, the court's decision is governed by c. 151B, not the ADA. Chapter 151B has not been so amended. In general, it appears that the Massachusetts courts interpret c. 151B more broadly than Federal courts have interpreted the ADA. See, e.g., *Dahill v. Police Dep't of Boston*, 434 Mass. 233, 240 (2001) (declining to follow the Supreme Court's holding in *Sutton* that mitigating measures must be considered when determining whether an individual is disabled, and concluding instead that considering mitigating measures is inconsistent with c. 151B's "broad mandate"); *Gil v. Vortex*, 697 F. Supp. 2d 234, 240 (D. Mass. 2010) ("The court is . . . confident that the Supreme Judicial Court . . . would apply the same revised standard [as the ADAAA] in interpreting the term disability for purposes of Chapter 151B.").

Nonetheless, despite this generally broad interpretation, the SJC's decision in *City of New Bedford* closely followed *Sutton's* holding that "[a]n employee is 'regarded as' having a 'substantial limitation' on the major life activity of 'working' only if his perceived impairment precludes him from performing a class of jobs." *City of New Bedford*, 440 Mass. at 461. Although *City of New Bedford* predates the ADAAA by

several years, courts have relied on it after the ADAAA took effect. See *Mercado v. Manny's T.V. & Appliance, Inc.*, 77 Mass. App. Ct. 135, 142 (2010) ("In order to be considered substantially limited in the major life activity of working, the employee must be able to show that his impairment prevented or restricted him from performing a class of jobs or broad range of jobs in various classes."); *Barton v. Clancy*, 632 F.3d 9, 17 (1st Cir. 2011) ("An employee's impairment, whether actual or perceived, substantially limits the employee in the major life activity of working only if the impairment 'precludes him from performing a class of jobs.'). See also *MCAD Guidelines* at II(A)(6) (same). While *City of New Bedford* remains governing law, the court concludes that Kavaleski has shown that the City regarded her as disabled even under its stricter standard.

2. "Regarded As" Analysis

Under *City of New Bedford*, "[n]ot all physical or mental impairments constitute a 'handicap' under the Massachusetts antidiscrimination statute." 440 Mass. at 462. "First, we consider whether a plaintiff's condition, actual or perceived, constitutes a mental or physical 'impairment.'" *Id.* at 463, quoting G.L. c. 151B, § 1(20). "Second, we determine whether the life activity curtailed constitutes a 'major' life activity as defined in G.L. c. 151B, § 1 (20), and its accompanying regulations." *City of New Bedford*, 440 Mass. at 462, quoting G.L. c. 151B, § 1(20). "Third, 'tying the two statutory phrases together, we ask whether the impairment substantially limited the

major life activity." *City of New Bedford*, 440 Mass. at 463, quoting *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).

First, therefore, the court must consider whether Kavaleski's perceived condition constituted an impairment. It is undisputed that she was perceived as having "very limited self-awareness" and "inflexible" approaches to stress, which "would affect her capacity to evaluate situations and make effective judgments in less tightly controlled situations than she now faces." She was perceived as "stiff" and "guarded" with thinking that was "extremely concrete." She was also perceived as an "inflexible, interpersonally stiff woman whose extreme defensiveness limits her capacity to reflect on her own decision-making, responses, actions or impact on others", and as "ignoring or having difficulty understanding the larger significance." She was described as possessing a "characterologic rigidity." Dr. Reade described her as "mildly depressed", while Dr. Brown described her examination results as "not inconsistent" with obsessive-compulsive disorder and somatization. In sum, and in the absence of any evidence from the City to the contrary, Kavaleski has shown that the City regarded her as impaired. See Mass.R.Civ.P. 56(e) ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."). See also Webster's Second New

College Dictionary (1998) (defining "to impair" as "[t]o decrease in strength, value, amount, or quality").

The court must next examine whether the perceived impairment was seen as curtailing a major life activity. "The term 'major life activities' means functions including, but not limited to, caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." G.L. c. 151B, § 1 (20). "Other examples of major life activities include sitting, standing, lifting and mental and emotional processes such as thinking, concentrating and interacting with others." *MCAD Guidelines* at II(A)(5). *Flagg v. AliMed, Inc.*, 466 Mass. 23, 32 (2013) ("The primary responsibility to determine the scope of [c. 151B] has been entrusted to the [commission], not to the courts,' and we generally afford the commission's interpretation of c. 151B's provisions substantial deference.") (citation omitted, brackets and quotation marks in original).

The City argues that it could not have regarded Kavaleski as substantially limited in the major life activity of working, since it knew she was a city employee working for Veterans Services during her psychological evaluations. The City also cites Kavaleski's other sources of employment and additional qualifications to show that it could not have regarded her as substantially limited in the major life activity of working. The City has not, however, set forth any evidence of its perception of Kavaleski based on these additional criteria. See Mass. R. Civ. P. 56(e).

By contrast, Dr. Reade's broad, sweeping statements about Kavaleski's personality and appearance, such as the use of the word "characterologic," demonstrate her perception of Kavaleski as substantially limited across a broad class of jobs and, indeed, many other activities. It is undisputed that, in her deposition, Dr. Reade attributed Kavaleski's ability to perform her job at Veterans' Services to her familiarity with the position. It is undisputed that Dr. Scott expressed doubt about Kavaleski's ability to "evaluate situations and make effective judgments in less tightly controlled situations than she now faces." These statements are not consistent with a perception of a candidate as unable to perform only a "particular aspect" of a "single, particular job." Cf. *City of New Bedford*, 440 Mass. at 466 ("A perception that an employee is unable to perform only a particular aspect (SWAT team membership) of a single, particular job (New Bedford police officer) is not sufficient to satisfy the 'substantial limitation' requirement of the statute."); *Sutton*, 527 U.S. at 493 (able to work in other positions as pilots but not as commercial airline pilots). To the contrary, the ability to analyze situations, make judgments, and relate effectively to other people is essential to many, if not all, jobs.

Quite apart from her ability to work, Dr. Scott and Dr. Brown repeatedly suggested that Kavaleski suffered from an eating disorder, despite a total lack of corroborating evidence. Dr. Reade made the same intimation in her testimony before the Commission. Regarding Kavaleski as suffering from an eating disorder is

equivalent to regarding her as substantially impaired in the major life activity of eating. See *Franchi v. New Hampton Sch.*, 656 F. Supp. 2d 252, 259 (D.N.H. 2009) ("Even under the pre-ADAAA definition of 'substantially limits,'" the plaintiff adequately pled that her minor daughter's eating disorder "substantially limited her eating, a major life activity."). The undisputed, uncontradicted evidence in the record shows that the screeners also regarded Kavaleski as substantially limited in "mental and emotional processes such as thinking, concentrating and interacting with others," for the reasons described above. *MCAD Guidelines*, II(A)(5).

The fact that all of these opinions are undisputedly untrue — and, indeed, even bizarre — should not relieve the City from liability. Nor should the City be relieved of liability because its screeners did not definitively diagnose Kavaleski with a specific condition, but rather alluded to a variety of ailments or flaws. It cannot be the case that an employer may avoid liability for "regarded as" handicap discrimination by creating a shifting target of fear and speculation that a candidate will never be able to rebut. The purpose of c. 151B is to prevent employment decisions based on amorphous, unsubstantiated fears about psychological or medical impairments, no matter how peculiar or off-base these fears might be. *Dahill*, 434 Mass. at 240, quoting *Cox v. New England Tel. & Tel. Co.*, 414 Mass. 375, 383-384 (1993) ("The public policies underlying G.L. c. 151B, § 4 (16), are clear: to protect 'handicapped individuals from deprivations based on prejudice, stereotypes, or

unfounded fear, while giving appropriate weight to such legitimate concerns of employers as avoiding exposing others to significant health and safety risks").

In addition, it is well-settled that "as part of his *prima facie* case, a plaintiff alleging a violation of G.L. c. 151B, § 4(16), need not establish that he was terminated (or received some other adverse treatment from his employer) 'solely' because of his handicap." *Dartt v. Browning-Ferris Indus.*, 427 Mass. 1, 7 (1998). In other words, notwithstanding the possibility that political or personal animus may have contributed to the City's decision to revoke her job offer, Kavaleski has set forth a *prima facie* case.

C. Legitimate, Non-Discriminatory Reason

Because Kavaleski has set forth a *prima facie* case as a matter of law, the burden shifts to the City "to articulate a legitimate, non-discriminatory reason for [its] employment decision, and produce credible evidence that the reason advanced was the real reason." *Sensing*, 575 F. 3d at 154 (citations and internal quotations omitted). The City contends that its legitimate reason for revoking its conditional offer to Kavaleski was its sincere belief that she was unable to perform the essential job functions of an armed Boston police officer, even though she would have been able to perform numerous other jobs. The City points to no evidence other than Dr. Reade's testimony before the Commission to this effect. However, as the Commission noted in its decision, and as the SJC also observed, Dr. Reade's

testimony and reports fail to cite a single example of how Kavaleski's perceived traits would interfere with her ability to serve as a Boston police officer. Since the City has provided no other evidence, the court concludes that it has failed to meet its burden on its cross-motion for summary judgment and has failed to withstand Kavaleski's motion for summary judgment on this claim. See Mass. R. Civ. P. 56(e).

Kavaleski is entitled to summary judgment in her favor on Count II of her Counterclaim against the City.

II.

Kavaleski also claims that the City used its psychiatric screening process in violation of G.L. c. 151B, § 4(16), which provides as follows:

An employer may not make preemployment inquiry of an applicant as to whether the applicant is a handicapped individual or as to the nature or severity of the handicap, except that an employer may condition an offer of employment on the results of a medical examination conducted solely for the purpose of determining whether the employee, with reasonable accommodation, is capable of performing the essential functions of the job, and an employer may invite applicants to voluntarily disclose their handicap for purposes of assisting the employer in its affirmative action efforts.

G. L. c. 151B, § 4(16) (emphasis added). Kavaleski asserts the City did not conduct the psychological screening solely for the purpose of determining whether she was capable of performing the essential functions of the job. In other words, she argues that using a medical or psychological examination for any other purpose, even a non-discriminatory purpose, is a violation of c. 151B. This would presumably

include using a medical examination as a ruse in order to screen out candidates for personal or political reasons.

The court begins its analysis with the plain language of the statute. See *Dartt*, 427 Mass. at 8. The word "solely" is a restrictive term that suggests the purpose of a post-offer medical examination is limited to the one purpose set forth in the statute. See *id.* (discussing "solely" in the context of an employer firing an employee "because of" the employee's handicap, as opposed to "solely because of" the same).

The SJC noted in its decision in this case that "to comport with the requirements of the Massachusetts antidiscrimination law, G.L. c. 151B, § 4 (16), and provisions of the Americans with Disabilities Act, 42 U.S.C. § 12112(d) (2006), an employer may not conduct medical or psychological testing prior to making an offer of employment, but may condition an offer of employment on the successful completion of such testing." *Kavaleski*, 463 Mass. 680, 682 n.5 (2012). "The only permissible purpose for which these tests may be used is to determine 'whether the employee, with reasonable accommodation, is capable of performing the essential functions of the job.'" *Id.*, quoting G. L. c. 151B, § 4 (16). Apart from this footnote, there does not appear to be any Massachusetts case law on this issue.

The MCAD Guidelines do offer some guidance, however. *MCAD Guidelines* at V(B). See *Dahill*, 434 Mass. at 239 ("The guidelines represent the MCAD's interpretation of G.L. c. 151B, and are entitled to substantial deference, even though

they do not carry the force of law." Specifically, the *Guidelines* provide as follows: "An employer must make a conditional job offer before requiring a medical examination (and/or making inquiries). A conditional job offer is an offer of employment to a job applicant which is contingent upon the satisfactory results of a medical examination (and/or inquiry). Prior to making a conditional job offer, the employer should have evaluated all relevant non-medical information." *MCAD Guidelines* at V(B).

The *MCAD Guidelines* accord generally with the Federal case law on point. See, e.g., *Dartt*, 427 Mass. at 9, n.13 (while interpreting c. 151B, courts occasionally consider judicial interpretations of Federal civil rights statutes). Federal law permits employers to require a medical examination only after an offer of employment has been made. 42 U.S.C. § 12112(d)(3). The offer may be conditioned on the results of the examination only if "(A) all entering employees are subjected to such an examination regardless of disability; (B) information obtained regarding the medical condition or history of the applicant is [confidential] . . . [and] (C) the results of such examination are used only in accordance with this subchapter." *Id.* An employer "shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity." *Id.* § 12112(d)(4)(A).

In addition to the requirements set forth 42 U.S.C. § 12112(d)(4)(A), the job offer made to the candidate must be "real" in order for the employer to subsequently require a medical examination. *Leonel v. American Airlines, Inc.*, 400 F. 3d 702, 708 (9th Cir. 2005). To constitute a "real" offer for the purposes of the ADA, the employer must have "evaluated all relevant non-medical information which it reasonably could have obtained and analyzed prior to giving the offer." *Leonel*, 400 F.3d at 708. All non-medical components of the application process must have been completed. *Id.* See also *MCAD Guidelines* at V(B) (same). The court in *Leonel* explained the rationale for the two-step process as follows:

When employers rescind offers made conditional on both non-medical and medical contingencies, applicants cannot easily discern or challenge the grounds for rescission. When medical considerations are isolated, however, applicants know when they have been denied employment on medical grounds and can challenge an allegedly unlawful denial.

Id. at 709. Thus, an offer contingent on both a medical examination and a non-medical component, such as a background check, a personal interview, a polygraph test, employment verification, or the like, is not "real." *Id.* "[T]he ADA . . . deliberately allow[s] job applicants to shield their private medical information until they know that, absent an inability to meet the medical requirements, they will be hired, and that if they are not hired, the true reason for the employer's decision will be transparent." *Id.* at 711. See also *MCAD Guidelines* at (IV)(A) ("Employers may not ask applicants about handicaps or disabilities until after the applicant has been

given a conditional job offer.

The purpose of this restriction is to isolate consideration of an applicant's job qualifications from any consideration of his/her medical or disability-related condition."). In *Leonel*, the court held that the offers were not "real" because the defendants had not yet completed non-medical components of the application process, including background checks. 400 F.3d at 711. The medical examinations therefore were "unlawfully premature." *Id.* at 709.

The parties do not address whether the offer constituted a "real" offer in this case, such that no additional steps remained after the medical examination. Even assuming it was a "real" offer, however, the medical examination was unlawful. The court has already determined that the City improperly regarded Kavaleski as disabled and revoked her offer on that basis. As such, the City did not use the medical examination "solely for the purpose of determining whether the employee, with reasonable accommodation, is capable of performing the essential functions of the job" G. L. c. 151B, § 4(16). Instead, the City erroneously determined that she was unable to perform the essential job functions based on its unsubstantiated perception of her as handicapped. This was discriminatory and in violation of § 4(16).

The City relies on *Miller v. City of Springfield*, 146 F.3d 612 (8th Cir. 1998), to argue that the psychological screening here was lawful because it was job-related and consistent with business necessity. In *Miller*, the plaintiff was bypassed for a position

as a police officer after receiving above-normal scores for depression on the MMPI-2. The Eighth Circuit held that the plaintiff was not "regarded as" disabled under the ADA, because the police department, for which she worked as a dispatcher, did not regard her as substantially limited across a class of jobs. *Id.* at 615. "She therefore cannot base a claim of discrimination on this regulation because she was not screened out on the basis [of] any disability." *Id.* As described above, the court has already determined that Kavaleski was "regarded as" handicapped. The medical examination here was unlawful on that basis.

The court in *Miller* stated that, "[i]n any event, we easily conclude that appropriate psychological screening is job-related and consistent with business necessity where the selection of individuals to train for the position of police officer is concerned." *Id.* See 29 Code Fed. Regs. § 1630.149(b) ("If certain criteria are used to screen out an employee or employees with disabilities as a result of such an examination or inquiry, the exclusionary criteria must be job-related and consistent with business necessity, and performance of the essential job functions cannot be accomplished with reasonable accommodation . . ."). The same language is contained within the *MCAD Guidelines*, which provide that "[u]nder Mass. Gen. L. ch. 151B, if an individual is not hired because a post-offer medical examination (and/or inquiry) reveals a disability, the exclusionary criteria used must be job-related, consistent with business necessity and necessary for the performance of

the essential functions of the job sought." *MCAD Guidelines* at (V)(B) (footnotes omitted). These provisions do not apply where, as here, the examination here did not "reveal a disability." See *id.* Instead, the examination served only to create the City's erroneous perception of a handicap. Thus, there is no need to determine whether the exclusionary criteria were "job-related" or "consistent with business necessity" pursuant to the *MCAD Guidelines*. To the contrary, it is illogical to suggest that eliminating an otherwise qualified candidate based on an erroneous perception of a disability or handicap could ever be job-related or consistent with business necessity. The medical examination was improper as a matter of law.

Kavaleski is entitled to summary judgment in her favor on Count I of her Counterclaim against the City.

ORDER

For the foregoing reasons, Plaintiff in Counterclaim Kavaleski's Motion for Summary Judgment Against the City of Boston (Paper #69) is **ALLOWED** and the Defendant in Counterclaim, City of Boston's Cross-Motion for Summary Judgment (No Paper #) is **DENIED**.



Peter M. Lauriat
Justice of the Superior Court

Dated: August 14, 2014